# In the Supreme Court of the United States

No. 77-1780

COMMONWEALTH OF PENNSYLVANIA,
*Petitioner*

v.

U. S. TOBACCO COMPANY,
*Respondent*

*On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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## COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the imposition of Pennsylvania corporation income tax, Tax Reform Code of 1971, P.L. 6, as amended, Article V, §501 et seq., 72 P.S. §501, is prohibited by Public Law 86-272, Title 1, §101, Sept. 14, 1959, 73 Stat. 555, 15 U.S.C. §381, where the Respondent's sole contact with Pennsylvania was through ten "missionary representatives" who visited retailers and independent wholesalers to solicit orders for Respondent's products, which orders were thereafter sent to Greenwich, Connecticut for approval or rejection and, if approved, were filled by shipment in interstate commerce from points outside of Pennsylvania and where Respondent maintained no offices or inventory within Pennsylvania?

*Answered in the affirmative by the Supreme Court of Pennsylvania.*

## COUNTER-STATEMENT OF THE CASE

This case is before Your Honorable Court on a Petition for Writ of Certiorari to the Supreme Court of Pennsylvania, which Court, by its Opinion and Judgment dated March 23, 1978, —— Pa. ——-, 386 A.2d 471 (1978), reversed the Decision and Order of the Commonwealth Court of Pennsylvania, dated December 5, 1975, 22 Pa. Commonwealth Ct. 211, 348 A.2d 755 (1975).

The facts are not in dispute. Respondent is a New Jersey corporation engaged in the manufacture and sale of tobacco products. Respondent's products are sold exclusively in interstate commerce, in part to Pennsylvania customers. During 1971, the tax year in question, the Respondent maintained no manufacturing plants in Pennsylvania, stored no inventory in Pennsylvania and maintained no office or place of business of any kind in Pennsylvania. Respondent had no bank accounts in Pennsylvania, maintained no corporate records in Pennsylvania and held no corporate meetings in Pennsylvania.

The sole contact between Respondent and the Commonwealth of Pennsylvania during 1971 was through Respondent's "missionary representatives" whose only function consisted of the solicitation of orders for Respondent's products. The missionary representatives had no authority to accept or reject orders, to adjust or settle any claims, collect accounts receivable, run credit checks or otherwise handle any moneys due Respondent. The missionary representatives had no agency powers or au-



thority to revise any price lists, circulars or letters issued by Respondent. The representatives were bound by, controlled from and paid on a salaried basis from the Greenwich, Connecticut office of Respondent and were subject to the direction of an administrative officer in Greenwich, Connecticut.

All orders for Respondent's products were accepted or rejected in Greenwich, Connecticut. All billings, collections, inventory controls and sales controls were handled by Respondent's Greenwich office. Orders accepted were completed on shipping orders from the Greenwich office to the factory nearest the customer and shipped therefrom by common carrier directly to the purchaser. The large bulk of all orders for Respondent's tobacco products was received directly by the Greenwich, Connecticut office without any intervention or solicitation whatsoever by the missionary representatives.

Respondent's missionary representatives visited independent wholesalers to inform them of company programs and promotions and to take or suggest orders for Respondent's products.

Respondent's missionary representatives also visited retail stores in an effort to solicit orders for Respondent's products. The representatives carried with them samples of Respondent's products, set up counter displays and introduced new products to retailers. On occasion, the missionary men would remove stale products from counter displays and replace such items with fresh products. The representatives sometimes gave "gratis" supplies of new products in order to introduce such products to the retailers, promote sales and gain favorable counter space

in retail outlets. Samples carried were purchased by the missionary representatives from the local independent wholesalers at the wholesale price. On occasion, a retailer would agree to carry a supply of a particular new product, and the retailer would pay the missionary representative the same price, hence, no profit whatsoever was realized by Respondent or any other entity on these transactions. The retailers were encouraged and requested to order the Respondent's products on a regular basis from local independent wholesalers which in turn ordered their products from Respondent in Greenwich, Connecticut.

In *Commonwealth v. United Tobacco Co.*, 70 Dauph. 217 (1957), it was held previously that the Respondent's solicitation activities during the year 1952 did not constitute a sufficient taxable nexus in Pennsylvania upon which to impose corporation income tax. Respondent's solicitation activities during 1971 and 1952 were identical in all respects.

Respondent, at all times pertinent hereto, has contended (1) that its activities in Pennsylvania during 1971 were limited to the "solicitation of orders" for its products and Respondent therefore was immune from net income taxation by the Commonwealth of Pennsylvania under the provisions of P.L. 86-272, 15 U.S.C. §381, and (2) that because of Respondent's minimal contact with Pennsylvania, Pennsylvania corporation income tax, as applied to it, was unconstitutional as violative of the Due Process and Commerce Clauses of the Constitution of the United States.



## REASONS FOR DENYING THE WRIT OF CERTIORARI

### I.

**The Petition for Writ of Certiorari should be denied because no substantial federal question has been presented or exists and because the decision sought to be reviewed is consistent with prior applicable decisions of this Court.**

The Respondent, United States Tobacco Company, respectfully submits that the Petitioner has failed to raise any substantial federal question not heretofore decided by this Court, or a question decided by the Supreme Court of Pennsylvania in a way not in accord with the applicable decisions of this Court.

In connection with its first reason for granting the Writ of Certiorari, the Petitioner takes as its premise the conclusion that the various state courts have been inconsistent and have rendered contradictory opinions in determining the scope of the exclusion from state income taxation afforded multi-state taxpayers under 15 U.S.C. §381, Petition for Writ of Certiorari, p. 9. Petitioner apparently bases its conclusion on the mere fact that in certain cases it has been held that 15 U.S.C. §381 did not prohibit imposition of a state tax on or measured by net income whereas in other cases it has been held that 15 U.S.C. §381 did prohibit such taxation. Such is not the result of "diametric construction" (sic) placed upon 15

U.S.C. §381, as asserted by Petitioner, but rather is primarily the result of dissimilar and individual factual circumstances in the various cases.

As stated by the Pennsylvania Supreme Court in its opinion in this case:

> . . . each claimed §381 exemption from a state income tax must be judged on its individual facts. The totality of the solicitors' or representatives' activities must be considered, and any nexus with the taxing state that cannot accurately be characterized as 'solicitation of orders' is sufficient to remove the protection of §381. . . . *United States Tobacco Company v. Commonwealth of Pennsylvania,* Pa. , 386 A.2d at 477 (1978), Petition for Writ of Certiorari, p. 43.

Merely because differing results are reached in cases involving different facts does not establish that the various state courts have interpreted 15 U.S.C. §381 inconsistently.

It is respectfully submitted that a study of each of the cases cited by Petitioner on pages 9 and 10 of the Petition for Writ of Certiorari reveals that they do indeed evidence a remarkably uniform interpretation of the operative provisions of 15 U.S.C. §381 by the several state courts.

Because each case to be decided under 15 U.S.C. §381 must necessarily be decided on its particular facts, a review of the instant case by this Court would not be determinative of future cases arising under 15 U.S.C. §381.



15 U.S.C. §381 has come to the attention of Your Honorable Court on four previous occasions. *Heublein v. South Carolina Tax Commission,* 409 U.S. 275 (1972); *International Shoe Co. v. Cocreham,* 246 La. 244, 164 S.2d 314 (1964), cert. denied 379 U.S. 902 (1964); *Olympia Brewing Co. v. Department of Revenue,* 266 Or. 309, 511 P.2d 837 (1973), cert. denied, 415 U.S. 976 (1974); *Clairol, Inc. v. Kingsley,* 109 N.J. Super. 22, 262 A.2d 213, affirmed 57 N.J. 199, 270 A. 2d 702 (1970), appeal dismissed for want of a substantial federal question, 402 U.S. 902 (1971).

In *Heublein,* supra, this Court did not reach the issue of whether the activities of the company's representatives were limited to the solicitation of orders since the company was required by South Carolina law to transfer its products to its representatives who subsequently transferred them to local wholesalers. Such activity "was neither solicitation" nor the filling of orders "by shipment or delivery from a point outside the state" within the meaning of 15 U.S.C. §381. 409 U.S. at 278-79.

In *International Shoe,* supra, the Supreme Court of Louisiana on facts essentially the same as those of the instant case, held that 15 U.S.C. §381 *did* prohibit imposition of Louisiana state income tax. (On page 9 of the Petition for Writ of Certiorari, the Petitioner incorrectly states that the court in *International Shoe* decided that 15 U.S.C. §381 did not prohibit imposition of the tax in that case.)

In *Olympia Brewing,* supra, the Supreme Court of Oregon expressly declined to decide whether the activities of the company's representatives constituted something

more than the "solicitation of orders" and based its decision on the fact that the company maintained extensive personal property within the taxing state.

In *Clairol*, supra, the Superior Court of New Jersey held that the activities of the company's representatives in New Jersey went beyond the scope of "solicitation of orders" as provided by 15 U.S.C. §381. The appeal of Clairol to this Court was dismissed for want of a substantial federal question, 402 U.S. 902 (1971) and must be deemed to be a decision by this Court on the merits of the particular factual situation presented by that case. *Hicks v. Miranda*, 422 U.S. 332 (1975).

However, *Clairol* is clearly distinguishable from the instant case on its facts. Clairol's activities in New Jersey were obviously more extensive and of a completely different nature than the activities of Respondent in Pennsylvania in the instant case.

The primary function of certain of the Clairol representatives was "to promote the public's purchase and use of its products". The representatives made regular visits to retail druggists, reviewing displays, arranging promotions and suggesting ways to merchandise Clairol's products. The representatives also carried promotional material, business forms and samples. On occasion, they also took inventory of a store's stock, suggesting orders based on their findings. However, Clairol went beyond the above activities and those of Respondent in the instant case by also employing *"technicians"* located within New Jersey to call on beauty salons in order to instruct operators in the use of Clairol products. *The technicians did very little as far as the solicitation of orders was concerned*, 109 N.J. Super. at 30, 262 A.2d at 217. *Finally, Clairol maintained offices within the State of New Jersey*, Id. at 25, 262 A.2d at 215. Clearly, the activities of the company technicians in Clairol were unrelated to and went far beyond the mere solicitation of orders as well as the activities of Respondent's missionary men in the instant case. The Superior Court of New Jersey decided only that, taken as a whole, Clairol's activities in New Jersey went beyond the "solicitation of orders". That Court did *not* decide whether Clairol's activities in New Jersey, *without the technicians* and *without maintenance of offices*, would have constituted something beyond the "solicition of orders".



Since Respondent's activities in Pennsylvania consisted exclusively of the solicitation of orders for Respondent's products to be filled by shipments in interstate commerce, the taxation of Respondent in Pennsylvania would result in the existence of a substantial Federal question, since 15 U.S.C. §381 would be rendered virtually meaningless.

It is respectfully submitted that the decision of the Supreme Court of Pennsylvania in the instant case is consistent with the applicable decisions of this Court relative to 15 U.S.C. §381 and that no substantial Federal question has been presented. The Petition for Writ of Certiorari should be denied.

## II.

**The Petition for Writ of Certiorari should be denied because the Petitioner seeks to have this Court determine a question which Petitioner failed to raise before the Supreme Court of Pennsylvania and which was not decided by that court.**

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*A. The Petitioner's second question presented was never raised before the Pennsylvania Courts.*

As its second reason for granting the Writ of Certiorari, Petitioner urges that the United States Congress had no power to enact 15 U.S.C. §381. Petition for Writ of Certiorari, pp. 3, 10.

The Petitioner did not raise this contention before the various administrative bodies, the Commonwealth Court of Pennsylvania or the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania has rendered no opinion on this point and the Petitioner may not raise matters before this Court which it failed to raise before the lower Courts. *State Farm Mutual Auto Ins. Co. v. Duel,* 324 U.S. 154 (1945); *Walters v. City of St. Louis Mo.,* 347 U.S. 231 (1954); *Wilson v. Cook,* 327 U.S. 474 (1946); *Bothwell v. Buckbee, Mears Co.,* 275 U.S. 274 (1927).

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*B. Congress has not gone beyond the sphere of its power under the Commerce Clause in enacting 15 U.S.C. §381.*

The precise question which the Petitioner seeks to have this Court review, but which was not previously



raised by it, has been decided adversely to the Petitioner's position in *International Shoe Company v. Cocreham,* 246 La. 244, 164 So. 2d 314 (1964), cert. denied sub nom. *Mouton v. International Shoe Co.,* 379 U.S. 902 (1964). In that case, the Supreme Court of Louisiana stated as follows:

> Congress, by P.L. 86-272, has found as a fact that an undue burden was placed on interstate commerce by the action of 35 states in enacting various income tax statutes when applied to the situation here presented—that is, the sending of salesmen into the several states to secure orders for goods which were to be shipped in interstate commerce. . . . We conclude that the statute in question is a proper exercise of the plenary power of Congress over commerce and that the State law must yield insofar as it is sought to be applied to the activities involved herein. *International Shoe Company,* 246 La. at 266, 164 So. 2d at 322 (1964).

In the recent case of *Moorman Manufacturing Company v. G. D. Bair,* No. 77-454, decided June 15, 1978, 46 U.S.L.W. 4703, this Court held that the Commerce Clause power of Congress would clearly justify the imposition of uniform rules for the apportionment and division of income among the states.

> . . . It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all states to adhere to uniform rules for the division of income. It is to that body, and not this court, that the Constitution has committed such policy decisions. Id. at 4707

It can no longer be seriously doubted that the plenary power of Congress under the Commerce Clause to regulate interstate commerce includes the power to impose minimum standards for the imposition of income taxes by the various states upon multistate taxpayers engaged in interstate commerce. Constitution of the United States, Article VI, Clause 2, *Gibbons v. Ogden,* 9 Wheat 1 (1824); *Parkersburg & Ohio River Transportation Co. v. City of Parkersburg,* 107 U.S. 691 (1883); *Northwestern Airlines, Inc. v. Minnesota,* 322 U.S. 292 (1944); *Michigan-Wisconsin Pipeline Co. v. Calvert,* 347 U.S. 157 (1954).

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*C. The Petitioner has failed to comply with Rule 33.2(b) of this Court.*

In urging that Congress had no power to enact 15 U.S.C. §381, Petitioner has drawn in question the constitutionality of an Act of Congress affecting the public interest. Nevertheless, Petitioner has failed to recite in its Petition for Writ of Certiorari that 28 U.S.C. §2403 may be applicable and has failed to serve its Petition for Writ of Certiorari on the Solicitor General of the United States as required by Rule 33.2(b) of this Court.

In view of the fact that Petitioner has failed to comply with the Rules of this Court, the Petition for Writ of Certiorari should be denied.



**III.**

**The Petition for Writ of Certiorari should be denied because the Respondent's activities in Pennsylvania do not go beyond the "solicitation of orders" and Respondent is therefore immune from Pennsylvania corporation income tax under 15 U.S.C. §381.**

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The third reason advanced by the Petitioner for issuance of the Writ of Certiorari is the conclusion that Respondent's activities in Pennsylvania "went far beyond mere solicitation". In support of this reason, Petitioner cites only *Miles Laboratories Inc. v. Department of Revenue,* 274 Or. 395, 546 P.2d 1081 (1976), but points to no specific activities of Respondent constituting more than solicitation and states that the "facts speak for themselves and it is unquestionably evident that the numerous activities of Respondent in Pennsylvania go far beyond mere solicitation". Petition for Writ of Certiorari, p. 13.

Similarly, before the Supreme Court of Pennsylvania, the Petitioner was unable to point to a single aspect of Respondent's activities in Pennsylvania which went beyond the "solicitation of orders".

After a full and detailed review of Respondent's activities in Pennsylvania, a discussion of the pertinent decisions in this Court and in the various states and an examination of the legislative history of 15 U.S.C. §381, the Supreme Court of Pennsylvania disagreed with the conclusion so easily reached by the Petitioner.

In so doing, the Supreme Court of Pennsylvania concluded that:

> When Congress enacts legislation exempting 'solicitation' by an interstate corporation from a state's net income tax, and does so in response to a case where the 'solicitation' involved activity incidental to the initial contact between seller and prospective buyer, we as state courts are bound to give foreign corporations §381 immunity even though their representatives engage in activities incidental to the initial contact between buyer and seller. The question is one of degree. The foregoing analysis, however, constrains us to disagree with those courts which have concluded that Congress intended 'solicitation' to be narrowly construed. (Citations omitted.) —— Pa. ——, 386 A.2d at 478, Petition for Writ of Certiorari, pp. 45-46.

Placing an unduly restrictive, narrow interpretation on the term "solicitation of orders" renders meaningless the limited immunity from state taxation which Congress intended to confer on corporations engaged exclusively in interstate commerce in enacting 15 U.S.C. §381. See: *Miles Laboratories,* supra; *Cal-Roof Wholesale Co. v. State Tax Commission,* 242 Or. 435, 410 P.2d 233 (1967); *Herff Jones Co. v. State Tax Commission,* 247 Or. 404, 430 P.2d 998 (1967); *Hervey v. AMF Beaird, Inc.,* 250 Ark. 147, 464 S.W. 2d 557 (1971) (citing *Cal-Roof*). Petitioner would have the court limit the immunity from state taxation provided by 15 U.S.C. §381 to situations where the activity of the taxpayer consists of nothing more than a mere request that a prospective customer purchase the taxpayer's product. Such an interpretation would frustrate the congressional intent embodied in 15 U.S.C. §381. Moreover, such interpretation would render 15 U.S.C. §381 completely meaningless by limiting its application to situations which simply do not exist in the business world. If Congress had intended to limit the applicability of 15 U.S.C. §381 as urged by the Petitioner, it would not have used the phrase "solicitation of orders", a term well understood by businessmen as encompassing those activities necessary, incidental and inextricably related to requests for the purchase of a Seller's products.



Congress clearly sought to protect the right of corporations to function within the various states free of onerous tax burdens so long as their activities are limited to the "solicitation of orders". In making evanescent distinctions between "solicitation" and "solicitation plus", "merchandising" or "marketing", when all of the activities in question are clearly necessary and incidental to the "solicitation of orders", as in the instant case, would defeat the very purpose of 15 U.S.C. §381.

The better view is surely that espoused by the Supreme Court of Pennsylvania and the majority of states which have considered the question—that Congress intended "solicitation of orders" as involving sundry activities *so long as the activities are closely related to the sale of products and are inextricably connected with the solicitation of orders.* See: *Gillette Co. v. State Tax Commission,* 56 App. Div. 2d 475, 393 N.Y.S. 2d 186 (1977); *State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission,* 382 S.W. 2d 645 (Mo. 1964); *Oklahoma Tax Commission v. Brown-Forman Distillers Corp.,* 420 P.2d 894 (Okla. 1966); *International Shoe*

*Co. v. Cocreham*, supra; *Coors Porcelain Co. v. State*, 183 Colo. 370, 517 P.2d 838 (1973). It should be noted that the immunity conferred upon corporations engaged exclusively in interstate commerce by 15 U.S.C. §381 is nevertheless limited in that any activities which cannot accurately be characterized as "solicitation of orders" are sufficient to remove the immunity.

*All* of the activities conducted by Respondent's missionary men in Pennsylvania are incidental and inextricably related to requests for orders of Respondent's products. Such activities make possible the ultimate sales of Respondent's products in interstate commerce.

It is respectfully submitted that the Respondent's activities in Pennsylvania do not rise beyond "solicitation of orders" for its products, that the Supreme Court of Pennsylvania properly so held and it is urged that the Court deny the Petition for Writ of Certiorari.

## CONCLUSION

The Respondent, United States Tobacco Company, respectfully submits that the Petitioner has failed to raise any substantial Federal question not heretofore decided by this Court or any question decided by the Supreme Court of Pennsylvania in a way not in accord with the applicable decisions of this Court. The Respondent further respectfully submits that the Decision of the Supreme Court of Pennsylvania is in accord with the provisions of 15 U.S.C. §381 and is consistent with the provisions of the Constitution of the United States.



The Respondent therefore respectfully urges that Your Honorable Court deny the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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